

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EUGENE BLACK	:	CIVIL ACTION
	:	
v.	:	
	:	
SOUTHEASTERN PENNSYLVANIA	:	
TRANSPORTATION AUTHORITY	:	NO. 05-3411

MEMORANDUM AND ORDER

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE

October 3, 2006

The Defendant has filed a Motion in Limine to preclude certain testimony anticipated from Portia Brister, an employee of Septa. According to Ms. Brister's deposition, she spoke with Jacqueline Dicks and Michael Bazis after the interviews for the Network Services Specialist had taken place. Ms. Brister testified that both Ms. Dicks and Mr. Bazis made statements that they couldn't understand why Mr. Black was not selected for the position. (Brister Dep., at 31). The Defendant argues that the statements made by Ms Dicks and Mr. Bazis were not made within the scope of their employment. Thus, they cannot be admissions by a party-opponent.

We first note that we don't understand why there is any controversy concerning the statement made by Ms. Dicks. The undisputed evidence is that Ms. Dicks ranked the Plaintiff first out of all of the interviewees.

More importantly, however, we believe that the statements fall into the 801-party opponent exception to the hearsay rule. Rule 801(d)(2)(D) provides that a statement is not hearsay if the statement is made "by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." The Defendant contends that because the comments made by Ms. Dicks and Mr. Bazis were made during casual conversations, they were not acting within the scope of their employment when

making the statements.

In support of its position, Septa cites cases that a review of the context in which the statement is made is crucial to the 801(d)(2)(D) determination. See Starling v. Cronin, 2002 WL 23896 *2 (N.D. Ill. Jan. 7, 2002)(attorney was not acting as client's agent when making a casual statement in hallway of the courthouse); Moody v. Township of Marlboro, 885 F.Supp. 101, 104 (D.N.J. 1995)(attorney's casual statement to opposing counsel during a break in a deposition was inadmissible hearsay). The Defendant attempts to cast the conversation between Ms. Brister and Mr. Bazis in the light of Starling and Cronin: a casual conversation during a break, outside the place of business. Ms. Brister stated that the conversation with Mr. Bazis was probably just outside the building when the two went outside during business hours to smoke.

We reject the Defendant's argument. Although Ms. Brister did not specifically remember details about the conversations, it is clear that she spoke with the decision-makers, during company time, at their place of business, about their opinions concerning the interviews. Their responses are clearly admissions of a party opponent. Unlike the lawyers in Starling and Cronin, in the circumstances Ms. Brister describes, Mr. Bazis was speaking as a representative of Septa. In fact, his position – the supervisor of the NSS position – is exactly why Brister and Bazis were discussing the interviews.

An appropriate Order follows.

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ORDER

AND NOW, this 3rd day of October, 2006, upon consideration of the Defendant's Motion in Limine to Preclude Hearsay Testimony involving Statements made by Bazis and Dicks, the response, thereto, and for the reasons discussed in the accompanying Memorandum, IT IS HEREBY ORDERED that the Motion is DENIED.

BY THE COURT:

/s/Jacob P. Hart

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE